Filed 7/13/10 P. v. Carrasco CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CARLOS HUMBERTO CARRASCO et al., Defendants and Appellants.	D054174 (Super. Ct. No. SCD208418)

APPEALS from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed as modified.

I.

INTRODUCTION

A jury found Carlos Humberto Carrasco and Jose Nogales (collectively appellants) each guilty of two counts of second degree murder (Pen. Code, § 187, subd. (a))[1] (counts

1 Unless otherwise specified all subsequent statutory references are to the Penal Code.

3, 4) and one count of shooting at an inhabited residence (§ 246) (count 5).[2] With respect to each count, and each appellant, the jury found that the offense was committed for the benefit, at the direction of, or in association with, a criminal street gang (§ 186.22, subd. (b)), and also found that a principal used a firearm causing the death of another person within the meaning of section 12022.53, subdivisions (d) and (e)(1). After the jury returned its verdicts, the trial court found Nogales guilty of two counts of unlawful possession of a firearm (§ 12021, subd. (e)) (counts 6, 7) and found true gang enhancement allegations (§ 186.22, subd. (b)) associated with each count. The trial court sentenced Carrasco and Nogales each to 80 years to life in prison.

On appeal, Carrasco claims that the trial court erred in instructing the jury on second degree felony murder predicated on a violation of section 246. Specifically, Carrasco argues that *People v. Chun* (2009) 45 Cal.4th 1172, 1199 (*Chun*) stands for the proposition that section 246 is an assaultive type crime that cannot form the basis for a charge of second degree felony murder. Carrasco also claims that the trial court erred in admitting evidence concerning appellants' involvement in a shooting that occurred approximately two weeks prior to the charged offenses. In addition, Carrasco claims that his trial counsel provided ineffective assistance, both in failing to adequately argue that a

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2 The verdict forms in the record refer to counts 3, 4, and 5 as counts A, B, and C, respectively. The trial court used the numeric designations at sentencing, as does the abstract of judgment. Accordingly, we use the numeric designations of the counts throughout this opinion, for ease of reference.

potential defense witness did not have a valid basis for invoking his Fifth Amendment privilege to refuse to testify, and in failing to move to preclude a police detective from testifying regarding statements that Carrasco made to the detective shortly after the murders. Carrasco also claims that the cumulative error doctrine requires reversal of the judgment. We conclude that Carrasco has not established any reversible error.

Nogales claims that there is insufficient evidence in the record to support the jury's verdicts finding him guilty of two counts of murder (§ 187, subd. (a)) and one count of shooting at a inhabited residence (§ 246). We conclude that there is sufficient evidence in the record to support the jury's verdicts.

Nogales also claims that the trial court erred in imposing a court security fee in the amount of $140, rather than $100. The People concede that the abstract of judgment should be modified to reflect the imposition of a $100 court security fee as to Nogales, and a $60 court security fee as to Carrasco. We order that the abstracts of judgment be modified in accordance with the People's concessions, and affirm the judgment as modified.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The People's evidence*[3]

a. *The June 22, 2007 shootings*

On June 22, 2007, Karina Lopez was in a car in an alley. Lopez saw four men in the alley, one of whom was yelling at a fifth man. According to Lopez, one of the men from the group of four struck the fifth man in the head with a bottle. Lopez ducked down in the car. Shortly thereafter, she heard two gunshots.

A second witness, Ivet Sandoval, identified Carrasco in court as having been present in the alley during the June 22 shootings. Sandoval also testified that she had previously identified Nogales from a series of photographs as having been present in the alley and having fled the scene with a black gun tucked in his waistband. Carrasco's DNA was discovered on a bottle found at the scene of the June 22 shootings. Cartridge cases that matched the gun used in the murders charged in counts 3 and 4 were found at the scene of the June 22 shootings.

b. *The July 8, 2007 murders*

Just after midnight on July 8, 2007, several members of the Perez family and their friends were standing outside the Perez home, talking. A white pickup truck passed

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3 We provide only a brief summary of the People's evidence presented at trial in this section, in light of our discussion of the evidence supporting Carrasco's guilt in section III.A.4.c., *post*, and our discussion of Nogales's sufficiency claim in section III.B.1.b., *post*.

slowly by the Perez residence, made a U-turn at a cross street, and slowly approached the Perez residence again. Inside the pickup truck were the driver and at least one passenger. As the truck approached the Perez residence, it began driving even more slowly. The driver's side of the truck was closest to the Perez residence. The driver of the truck shouted through his open window, "Paradise Hills. Paradise Hills. P.H.." The driver also asked, "Where you from?" The driver appeared to be attempting to start a fight. Frank Perez, who was standing close to the truck, angrily responded, "Get out of here." The passenger door of the truck then opened, and the passenger began shooting at the people standing outside the Perez home. Both Frank Perez and his brother, John Perez, died from gunshot wounds to their heads.

At approximately 3:30 a.m. that morning, police saw Carrasco at a gas station standing next to a white pickup truck. Police detained Carrasco and his girlfriend, Janelle Greed, who was in the truck. Several people who had been outside the Perez residence at the time of the shootings, including Rene Perez, were taken to the gas station and asked whether they could identify Carrasco as one of the perpetrators of the Perez murders. Rene Perez told police, "Sure looks like him. . . ." A second eyewitness, Blanca Avalos, told police that Carrasco was a "good candidate."

While police were detaining Carrasco at the gas station, they learned that Carrasco had just dropped off Nogales at Nogales's apartment. At approximately 6:00 a.m. that morning, police went to Nogales's apartment, arrested him, and found the firearm that was used in both the June 22 shootings and the July 8 murders.

c. *Gang evidence*

The Paradise Hills criminal street gang has approximately 48 members. Carrasco and Nogales are active members of the gang. The July 8 murders were committed in the territory of a gang called the "Lomita Village 70s." The Paradise Hills gang and the Lomita Village 70s gang have a long standing rivalry.

2. *The defense*

Carrasco presented the testimony of several eyewitnesses who had not identified him at the gas station on the night of the murders. Carrasco also testified at trial. Carrasco admitted that he had been driving his girlfriend's mother's white pickup truck on the night of the murders. Carrasco also admitted that he was a member of the Paradise Hills gang, that he was close friends with Nogales, and that he had spent the evening of the murders with Nogales at a party. Carrasco denied having driven the white pickup truck near the time of the murders. Nogales presented no witnesses in his defense.

B. *Procedural background*

In April 2008, in an amended information, the People charged Carrasco and Nogales with attempted murder (count 1) (§§ 664, 187, subd. (a)) and assault with a semi-automatic firearm (count 2) (§ 245, subd. (b)), together with various gang and firearm enhancements based on the June 22, 2007 incident. The People also charged both Carrasco and Nogales with two counts murder (§ 187, subd. (a)) (counts 3, 4), and one count of shooting at an inhabited residence (§ 246) (count 5) based on the July 8, 2007 incident. With respect to counts 3, 4, and 5, the People alleged that Carrasco and Nogales committed each offense for the benefit, at the direction of, and in association with, a

criminal street gang (§ 186.22, subd. (b)), and that a principal had used a firearm causing the death of another person within the meaning of section 12022.53, subdivisions (d) and (e)(1). With respect to counts 3 and 4, the People alleged that Carrasco and Nogales were guilty of murder in the first degree, and that they had committed more than one count of murder (§ 190.2, subd. (a)(3)). In addition, the People charged Nogales with two counts of illegally possessing a firearm (counts 6, 7), and alleged that each of these offenses was committed for the benefit, at the direction of, and in association with, a criminal street gang (§ 186.22, subd. (b)).

Prior to trial, Carrasco filed a motion to sever trial of the offenses related to the June 22 incident (counts 1, 2) from trial of the offenses committed on July 8 (counts 3-7). The court granted the motion to sever. In addition, Nogales moved to bifurcate the trial of the counts charging him with possession of a firearm (counts 6, 7), from trial of the counts charging him with murder and shooting at an inhabited residence (counts 3, 4, and 5). The trial court granted the motion for bifurcation. Nogales and the People agreed that counts 6 and 7 would be tried to the court.

The court held a jury trial on counts 3, 4, and 5. During deliberations, the jury informed the trial court that the jurors could not all agree as to whether the appellants were guilty of murder in the first degree. The prosecutor moved to dismiss the first degree murder charges and the related special circumstances allegations, and the trial court granted the motion to dismiss, in the interest of justice. The jury subsequently returned verdicts finding appellants guilty of two counts of second degree murder (§ 187, subd. (a)) and one count of shooting at an inhabited residence (§ 246), and also found true

the related gang and firearm enhancements. (See pt. I, *ante*.) Later that day, the trial court found Nogales guilty of two counts of unlawful possession of a firearm (§ 12021, subd. (e)) (counts 6, 7) and found true the gang enhancement allegations (§ 186.22, subd. (b)) associated with each count.

The trial court sentenced both Carrasco and Nogales to 80 years to life in prison. On count 3, the court sentenced both appellants to 40 years to life, consisting of 15 years to life for second degree murder, and 25 years to life for the section 12022.53 firearm enhancement. The court imposed an identical sentence on count 4, to be served consecutively to the sentences on count 3. On the remainder of the counts and enhancements, the court imposed either stayed terms or concurrent terms.

III.

DISCUSSION

A. *Carrasco's appeal*[4]

1. *The trial court committed harmless error in instructing the jury on second degree felony murder*

Carrasco claims that the trial court erred in instructing the jury on second degree felony murder. The People concede that the trial court erred in instructing the jury on second degree felony murder, in light of *Chun, supra*, 45 Cal.4th at page 1172. However, the People claim that the prejudice analysis applied by the *Chun* court makes clear that

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4 Nogales joins in Carrasco's claims, to the extent that he would benefit thereby. We afford such review whenever applicable.

the trial court's error was harmless beyond a reasonable doubt. We conclude that the trial court committed harmless error in instructing the jury on second degree felony murder.

a. *Governing law*

In *Chun*, the California Supreme Court held that "all assaultive-type crimes, such as a violation of section 246, merge with the charged homicide, and cannot serve as the basis for a second degree felony-murder instruction." (*Chun, supra*, 45 Cal.4th at p. 1178.) In *Chun*, the defendant was one of four persons in a Honda that was stopped at a traffic light. (*Id.* at p. 1179.) A person or persons in the Honda fired three different guns toward a Mitsubishi that was also stopped at the light. (*Ibid*.) A passenger in the Mitsubishi was killed, and two other persons were wounded. (*Ibid*.) The defendant was charged with "murder, with drive by and gang special circumstances, and with two counts of attempted murder, discharging a firearm from a vehicle, and shooting into an occupied vehicle, all with gang and firearm-use allegations, and with street terrorism." (*Ibid*.)

At trial, the People presented evidence that the defendant had admitted to the police that he was involved in the shooting. (*Chun, supra*, 45 Cal.4th at p. 1179.) The defendant told police that he had fired a gun, but also claimed that he had not pointed the gun at anyone, and that he had wanted only to scare the passengers in the Mitsubishi. (*Ibid*.) At trial, the defendant testified and denied any involvement in the shootings. (*Ibid*.) The trial court instructed the jury on first degree murder, and also instructed the jury on two different theories of second degree murder. (*Ibid*.) Specifically, as to second degree murder, the court instructed the jury on second degree felony murder based on shooting at an occupied motor vehicle (§ 246), either directly, or as an aider and abettor,

and also instructed the jury on implied malice as a theory of second degree murder. (*Chun, supra*, 45 Cal.4th at pp. 1202-1203.)[5]

The jury found the defendant guilty of second degree murder and also found that the defendant was an active participant in a criminal street gang. (*Chun, supra*, 45 Cal.4th at pp. 1179-1180.) The jury found that a principal intentionally used a firearm, and that the shooting was committed for the benefit of a criminal street gang. (*Ibid*.) The jury acquitted the defendant of both counts of attempted murder, shooting from a vehicle, and shooting at an occupied motor vehicle, and found the personal use of a firearm allegation not true. (*Id*. at p. 1180.)

On appeal, the *Chun* court concluded that the trial court had erred in instructing the jury on felony murder as a theory of second degree murder. (*Chun, supra*, 45 Cal.4th at p. 1201.) After reviewing prior case law in this area, the Supreme Court held, "When the underlying felony is assaultive in nature, such as a violation of section 246 or section 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction." (*Id*. at p. 1200.)

In addressing whether the trial court's instructional error required reversal, the *Chun* court noted that the trial court had adequately instructed the jury on an alternative

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[5] The *Chun* court defined implied malice as follows: "We have interpreted implied malice as having 'both a physical and a mental component. The physical component is satisfied by the performance of "an act, the natural consequences of which are dangerous to life." [Citation.] The mental component is the requirement that the defendant "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." [Citation.]' [Citation.]" (*Chun, supra*, 45 Cal.4th at p. 1181.) The *Chun* court also referred to this form of malice as "conscious-disregard-for-life malice." (*Chun, supra*, 45 Cal.4th at p. 1181, fn. 2.)

and legally valid theory of second degree murder, namely, second degree murder based on conscious-disregard-for-life malice. (*Chun, supra*, 45 Cal.4th at pp. 1202-1203.) The court stated, "In this situation, to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory . . . ." (*Chun, supra*, 45 Cal.4th at p. 1203.) In determining whether the jury in that case had based its verdict on a valid theory, the *Chun* court stated that it would apply the harmless error analysis that Justice Scalia proposed in his concurring opinion in *California v. Roy* (1996) 519 U.S. 2. (*Chun, supra*, 45 Cal.4th at pp. 1204-1205 ["Without holding that [Justice Scalia's approach] is the only way to find error harmless, we think this test works well here, and we will use it"].) The *Chun* court summarized that test as follows: "If other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for conscious-disregard-for-life malice, the erroneous felony-murder instruction was harmless." (*Chun, supra*, 45 Cal.4th at p. 1205.)

Applying this test to the facts in *Chun*, the Supreme Court stated:

> "[A]ny juror who relied on the felony-murder rule necessarily found that defendant willfully shot at an occupied vehicle.[6] The

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6 Elsewhere in the opinion, the *Chun* court stated that the fact that the jury acquitted the defendant of the underlying felony demonstrated that the "overall verdict had to have been either a compromise or an act of leniency." (*Chun, supra*, 45 Cal.4th at p. 1204.) The court reasoned, "[I]t is hard to reconcile this verdict. If defendant did not commit *this* murder by firing at or from a vehicle, how *did* he commit it? There was no evidence the victims were killed or injured by any method other than shooting from *and* at an occupied vehicle." (*Id.* at pp. 1203-1204.) The *Chun* court noted that the inconsistency did not, itself, serve as a basis for reversal because, "courts necessarily tolerate, and give effect to all parts of, inconsistent verdicts." (*Id.* at p. 1204.)

> undisputed evidence showed that the vehicle shot at was occupied by not one but three persons. The three were hit by multiple gunshots fired at close range from three different firearms. No juror could have found that defendant participated in this shooting, either as a shooter or as an aider and abettor, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life ─ which is a valid theory of malice. In other words, on this evidence, no juror could find felony murder without also finding conscious-disregard-for-life malice. The error in instructing the jury on felony murder was, by itself, harmless beyond a reasonable doubt." (*Chun, supra*, 45 Cal.4th at p. 1205.)

In *People v. Hach* (2009) 176 Cal.App.4th 1450, 1457 (*Hach*), applying *Chun*, the Court of Appeal concluded that the trial court had committed harmless error in instructing the jury on second degree felony murder. In *Hach*, the "defendant found his common law wife alone with her new lover in a car, . . . fired a single shot[,] and killed [the lover]." (*Hach, supra*, 176 Cal.App.4th at p. 1452.) The trial court instructed the jury on alternate theories of second degree murder, namely, malice aforethought, and felony murder with shooting at an occupied vehicle as the predicate felony. (*Ibid*.) The jury convicted defendant of both second degree murder (§ 187, subd. (a)) and shooting at an occupied vehicle (§ 246). The jury also found that the defendant personally discharged a firearm, causing death (§ 12022.53, subd. (d).)

In concluding that the trial court's error in instructing on felony murder was harmless, the *Hach* court reasoned:

> "We find the harmless error analysis of *Chun* applicable. To find defendant guilty of second degree felony murder, a juror must have found he willfully shot at an occupied vehicle. Indeed, we know the jury so found because, unlike in *Chun*, the jury convicted defendant of violating section 246. The factual distinctions from *Chun* are not significant. Defendant was only 10 feet away from the car and knew

> there were two people in it. He fired an SKS rifle directly into the car. As in *Chun*, the jury must have found defendant committed an act that is dangerous to life, knew of the danger, and acted with conscious disregard for life. In other words, the jury found defendant acted with implied malice. Accordingly, as in *Chun*, the error in instructing on second degree felony murder was harmless beyond a reasonable doubt." (*Hach, supra*, 176 Cal.App.4th at p. 1457.)

b. *Application*

We agree with the People's concession that, under *Chun*, the trial court erred in instructing the jury on second degree felony murder predicated on a violation of section 246. (*Chun, supra*, 45 Cal.4th at p. 1205 [concluding it is error for trial court to instruct the jury on second degree felony murder where underlying felony is a violation of section 246].)[7] We further agree with the People that an application of the prejudice analysis provided by the *Chun* court makes clear that the error was harmless beyond a reasonable doubt.

The evidence in this case showed that a truck being driven by one of the appellants approached a house and that the driver called out the name of a street gang. One of several people who were standing in front of the house told the driver of the truck to leave. Moments later, the other appellant opened a door to the truck and fired numerous shots in the direction of the house and the people standing in front of the house. Two gunshots struck two of the people.

In light of this evidence, no juror could have found that either of the appellants "participated in this shooting, either as a shooter or as an aider and abettor, without also

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7 *Chun* was decided after the trial in this case.

finding that [each] committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life ─ which is a valid theory of malice." (*Chun, supra,* 45 Cal.4th at p. 1205.) "[O]n this evidence, no juror could find felony murder without also finding conscious-disregard-for-life malice." (*Ibid*.) As in *Hach*, "The factual distinctions from *Chun* are not significant." (*Hach, supra,* 176 Cal.App.4th at p. 1457.) The error in instructing the jury on felony murder was therefore harmless beyond a reasonable doubt. (*Chun, supra*, 45 Cal.4th at p. 1205; see also *Hach, supra*, 176 Cal.App.4th at p. 1457.)

We reject each of Carrasco's arguments to the contrary. Carrasco maintains that this case is distinguishable from *Chun* and *Hach* because in both of those cases, the defendant shot at a vehicle. Carrasco argues that those cases thus involved "an act focused on a smaller target and much more likely to cause injury or death." The shooter in this case fired at least seven shots at several individuals standing in front of the house, from a truck stopped in front of the house. Carrasco's contention that the gunshots in this case were less likely to cause injury or death than the gunshot in *Hach* or the gunshots in *Chun* is not persuasive.

We also reject Carrasco's suggestion that the fact that the defendant in *Chun* was *not* convicted of the underlying felony supports the conclusion that the error in this case was prejudicial. The fact that the appellants in this case *were* convicted of the underlying felony ― shooting an inhabited residence (§ 246) ― makes clear that the jury found that each appellant either intended to shoot at an inhabited residence, or aided and abetted such a shooting. We reject Carrasco's contention that the fact that the jury found

appellants guilty of the underlying felony makes it anymore likely that the jury did *not* find that the appellants acted with conscious disregard for life. (See *Hach, supra*, 176 Cal.App.4th at p. 1457 [concluding trial court's error in instructing jury on second degree felony murder was harmless where jury convicted defendant of underlying felony].)

We reject Carrasco's claim that the fact that the jury must have found one of the appellants in this case guilty of murder pursuant to an aiding an abetting theory ─ i.e. as the driver of the truck and not the shooter ─ distinguishes this case from *Chun*. (See *Chun, supra*, 45 Cal.4th at p. 1205 ["No juror could have found that defendant participated in this shooting, *either as a shooter or as an aider and abettor*, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life," italics added].)

Finally, we reject Carrasco's suggestion that this court should not follow *Chun*, because, according to the Carrasco, "[N]owhere does the *Chun* court acknowledge or otherwise explain that the malice needed to support a conviction under Penal Code section 246 is qualitatively different than the malice aforethought required to support a conviction for second degree murder." We are bound by the Supreme Court's holding in *Chun* and must follow it. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Further, while Carrasco's claim is based on the contention that reversal is required because one cannot conclude from the jury's *verdict* in this case that the jury found that appellants acted with malice aforethought, the *Chun* court made it clear that a reviewing court should examine the *evidence* presented at trial in determining whether the court's instructional error requires reversal, not merely the verdict. (*Chun, supra*, 45

Cal.4th at p. 1205 ["If other aspects of the verdict *or the evidence* leave no reasonable doubt that the jury made the findings necessary for conscious-disregard-for-life malice, the erroneous felony-murder instruction was harmless," italics added].) We therefore reject Carrasco's argument that reversal is required because "the verdicts arrived at by the jury do not conclusively show the jurors found [that appellants acted with malice aforethought]."

2. *The trial court did not err in admitting evidence pertaining to appellants' involvement in a prior shooting*

Carrasco claims that the trial court erred in admitting evidence that approximately two weeks prior to the charged offenses, Nogales fired the gun used to kill Frank and John Perez during another shooting, and that Carrasco was present at that shooting. We review a trial court's evidentiary rulings under the abuse of discretion standard of review. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another ground by *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

a. *Factual and procedural background*

Prior to trial, Carrasco filed a motion to sever the trial of various offenses that appellants allegedly committed on June 22, 2007, from trial of the charged offenses. The June 22 offenses included an assault with a semi-automatic firearm (§ 245, subd. (b)) and attempted murder (§§ 187, subd. (a), 664). In his brief in support of the motion, Carrasco provided a summary of the evidence pertaining to the June 22 incident. Carrasco noted that the victim stated that he was accosted on the street by four men who called out their gang name. One of the men shot the victim. In their opposition to the motion to sever,

the People noted that they could present evidence that Carrasco and Nogales had been present at both the June 22 incident and the charged offenses, that a witness had identified Nogales as having had a gun tucked in his waistband during the June 22 incident, and that ballistics testing demonstrated that the same gun was used in both the June 22 incident and the charged offenses.

The trial court held a hearing on Carrasco's motion to sever. At the hearing, Nogales joined in the motion. After hearing argument from counsel, the trial court granted the motion. In granting the motion, the court stated, "This is, at best, a hollow victory for the defense. ¶ I think that [the prosecutor] is going to be able to make a tremendous case for allowing much of the circumstantial evidence [of the June 22 incident] to come in . . . ."

The day after the trial court granted the motion to sever, the court held a hearing on the admissibility of evidence pertaining to the June 22 incident at the trial of the charged offenses. The court engaged in an extensive discussion with counsel regarding the admission of the evidence concerning the June 22 incident. Carrasco's counsel argued that the evidence was inadmissible under Evidence Code sections 1101, subdivision (a) and 352. At the conclusion of the hearing, the court ruled that it would admit some evidence regarding the June 22 incident at trial of the charged offenses. Specifically, the court ruled that the People would be permitted to present evidence that on June 22, there was a fight in which the gun used in the Perez murders was fired. The court ruled that the People would also be allowed to present evidence that an eyewitness had identified both Carrasco and Nogales as having been present at the scene of the

June 22 shooting, that Carrasco's DNA was discovered on a bottle found at the scene of the June 22 shooting, and that an eyewitness saw Nogales walking away from the scene with a gun in his possession. The court ruled that it would exclude evidence demonstrating that a person had been shot during the June 22 incident.

At trial, Carrasco's counsel requested clarification of the court's ruling with respect to evidence pertaining to the June 22 incident. Specifically, Carrasco's counsel requested that, "Mr. Carrasco's name not be mentioned in all of the testimony regarding [the June 22] incident."

The trial court rejected this request. The court stated that it was admitting evidence pertaining to the June 22 incident both for the purpose of showing that approximately two weeks prior to the charged offenses, Nogales was in possession of the weapon that was used to committed the charged murders, and also to show that Carrasco and Nogales were together "when the gun [wa]s discharged," during the June 22 incident. The trial court summarized the relevance of the uncharged offense evidence as follows: "The purpose was twofold. Not just the gun. It was to link the gun to Mr. Nogales and Mr. Nogales to Mr. Carrasco."

Carrasco's counsel responded, "I don't know whether I did this before, we'd be objecting to the admission of that testimony relating to Mr. Carrasco without some type of limiting instruction to the jury how it can be used in a limited fashion." Carrasco's counsel explained, "I think it's either [Evidence Code section] 352 or lack of foundation. Other than Mr. Carrasco being in that alley, the general vicinity of the gun being fired,

doesn't seem to me that he should be tied into the firing of that weapon." The court stated that Carrasco's objection had been made, and that the objection was overruled.

At trial, the People presented evidence of the June 22 shootings in accordance with the trial court's evidentiary rulings. (See pt. II.A.1.a., *ante*.) Nogales filed a motion for new trial in which he argued that the trial court erred in admitting evidence concerning the June 22 incident. The People opposed the motion. The trial court denied Nogales's motion for a new trial.

b. *Governing law*

(i) *Evidence Code 1101*

Evidence Code section 1101 provides:

> "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> "(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

In *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*), the Supreme Court explained that there exists a continuum concerning the degree of similarity required in order for evidence of uncharged misconduct to be deemed admissible, which depends on the purpose for which introduction of the evidence is sought. The least degree of

similarity is required when the uncharged misconduct evidence is offered to prove intent, while "a higher degree of similarity is required to prove common design or plan, and the highest degree of similarity is required to prove identity." (*People v. Soper* (2009) 45 Cal.4th 759, 776, fns. omitted (*Soper*), citing *Ewoldt, supra,* 7 Cal.4th at pp. 402-403.)

"[A] fact finder properly may consider admissible 'other crimes' evidence to prove intent, so long as (1) the evidence is sufficient to sustain a finding that the defendant committed both sets of crimes [citations], and further (2) the threshold standard articulated in *Ewoldt* can be satisfied ─ that is, 'the factual similarities among the charges tend to demonstrate that in each instance the perpetrator harbored' the requisite intent. [Citations.] There is no requirement that it must be conceded, or a court must be able to assume, that the defendant was the perpetrator in both sets of offenses." (*Soper, supra,* 45 Cal.4th at p. 778.)

(ii) *Evidence Code section 352*

It is well established that uncharged offense evidence that is otherwise admissible pursuant to Evidence Code section 1101, " 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]' [Citation.]" (*Ewoldt, supra,* 7 Cal.4th at p. 404.) Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

(iii) *The admissibility of evidence of a defendant's possession of a weapon used to commit an offense*

Evidence of a defendant's possession of the weapon used, or possibly used, in an offense constitutes relevant circumstantial evidence of his commission of the offense. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1052.) Further, evidence of the defendant's possession of the weapon possibly used in a charged offense is admissible irrespective of whether the evidence is admissible as "other crimes" evidence pursuant to Evidence Code section 1101. (See *People v. Cox* (2003) 30 Cal.4th 916, 955, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 422, fn. 22 ["While we agree that admission of the guns might have been improper if offered as 'other crimes' evidence, under the facts of this case, the guns were sufficiently connected to the crimes; thus, their admission into evidence was proper"]; *People v. Lenart* (2004) 32 Cal.4th 1107, 1124-1125 [evidence that defendant told person that he carried "'a loaded .22'" in his truck was properly admitted over an uncharged crime objection where jury could have inferred that defendant was referring to the murder weapon because "evidence was . . . relevant to show defendant's identity as the perpetrator of the robbery and the murder committed with the [weapon] some 13 days later"].)

c. *Application*

Carrasco claims that the trial court erred in admitting evidence concerning the June 22 incident without "assessing its relevance and prejudicial effect in conjunction with Evidence Code section 1101, subdivision (b) . . . ." We disagree. Carrasco focuses on the fact that at the outset of the hearing concerning the admissibility of the evidence,

the trial court stated, "I do not intend the evidence to come in as [Evidence Code section] 1101, [subdivision] (b) evidence of other crimes to prove a committed crime in our case." The prosecutor then stated, "I understand you don't want an [Evidence Code section] 1101 argument that they committed the previous crime; therefore they committed this crime. But may I argue association evidence, motive evidence, knowledge evidence, and the natural probable consequences evidence?" The trial court responded in the affirmative, thereby indicating that the court was not foreclosing the possibility that the evidence might be admissible for one or more of the purposes mentioned in section [Evidence Code section] 1101, subdivision (b). In any event, the record establishes that the trial court was fully aware of Evidence Code sections 1101 and 352, and determined that the evidence pertaining to the June 22 incident was admissible, as limited by the court. No more was required. (See *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315 ["[A]s the Supreme Court has repeatedly and recently reaffirmed, 'when ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state that it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . section 352.' [Citations.]"].)

On the merits, Carrasco's primary argument is that the June 22 offenses were not sufficiently similar to the charged offenses to be offered as proof of identity, and that the evidence was not admissible for any other purpose. We reject this argument. To begin with, Nogales's possession of the murder weapon just 15 days prior to the murders constituted admissible circumstantial evidence of his commission of the charged murders.

(*People v. Carpenter, supra*, 21 Cal.4th at p. 1052; *People v. Cox, supra*, 30 Cal.4th at p. 955; *People v. Lenart, supra*, 32 Cal.4th at pp. 1124-1125.)

We assume for the sake of this opinion that the remainder of the evidence pertaining to the June 22 incident was not admissible to prove appellants' identities as the perpetrators of the charged offenses. (But see *People v. Medina* (1995) 11 Cal.4th 694, 748-749 [court stated, "the ballistic evidence alone probably would have been sufficient to justify admission of the 'other crimes' evidence" where ballistic evidence demonstrated that same gun was used in both charged murder and in uncharged murders]; *People v. Carpenter* (1997) 15 Cal.4th 312, 361-362, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.) However, even assuming that this is so, the evidence was admissible for another purpose.

In order for the jury to find Carrasco guilty of the charged murders on an aiding an abetting theory, the People were required to prove that Carrasco intended to aid and abet Nogales in committing the murders. Applying the admissibility test outlined in *Soper* for the admission of uncharged offense evidence to prove intent, Carrasco does not dispute that the People presented sufficient evidence to sustain findings that Carrasco committed both sets of crimes (see *Soper, supra*, 45 Cal.4th at p. 779), and there were factual similarities between the charged and uncharged offenses that tended to demonstrate that in each instance, Carrasco harbored the requisite intent. (*Ibid.*) Specifically, evidence tending to demonstrate that Carrasco was with Nogales during a fight in which Nogales fired a gun, 15 days prior to the charged murders, tended to prove Carrasco's intent to aid Nogales in his commission of the charged murders. The evidence also tended to

demonstrate that Carrasco knew that Nogales was armed and that Nogales was willing to fire a weapon on the night of the Perez murders, and that Carrasco intended to assist Nogales in the commission of the murders by driving to the Perez house, stopping the truck in front of the house, and calling out the name of appellants' gang.

While Carrasco argues that "there was no issue of intent or motive in the present offenses," Carrasco elsewhere notes that the jury had to determine "whether [Carrasco] shared [Nogales's] intent and also harbored malice aforethought." We agree that in order to find Carrasco guilty on an aiding an abetting theory, the jury had to determine that Carrasco "intended to aid and abet the perpetrator in committing the crime." (CALCRIM No. 401; see also *Soper, supra*, 45 Cal.4th at p. 777 ["Defendant's assertion that his defense to the two charges was bound to focus upon identity, and not intent, would not eliminate the prosecution's burden to establish both intent and identity beyond a reasonable doubt"].) We conclude that the evidence of the June 22 incident was relevant to demonstrate Carrasco's intent in aiding and abetting the charged offenses.[8]

We reject Carrasco's argument that the trial court erred in failing to exclude the evidence of the June 22 incident pursuant to Evidence Code section 352. For the reasons stated above, the evidence of the June 22 incident had significant probative value. By excluding evidence that a person was shot during the June 22 incident, the court limited the prejudicial effect of that evidence.

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8 In light of this conclusion, we need not consider the additional theories of admissibility that the People offer, including that the evidence was admissible to prove that the murders were committed for the benefit of a criminal street gang.

Carrasco also claims that the trial court erred in failing to instruct the jury regarding its consideration of the evidence of the June 22 incident, pursuant to a modified version of CALCRIM No. 375.[9] Carrasco claims that such an instruction would have informed the jury that the People were required to prove the uncharged offenses by a preponderance of the evidence, and would also have provided the jury with guidance as to the specific purpose or purposes for which it could consider the evidence. Carrasco did not request that the trial court provide this instruction, and the trial court had no duty to provide such a limiting instruction, sua sponte, in the absence of a request.[10] (See *People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1316.)

We reject Carrasco's argument that the trial court was required to provide an instruction, sua sponte, under *People v. Collie* (1981) 30 Cal.3d 43. In *Collie*, the court stated, "There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose," and that under such

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9 Carrasco makes this argument in support of his contention that the alleged error in admitting the evidence regarding the June 22 incident requires reversal. For the reasons stated in the text, we conclude that the trial court did not err in admitting the evidence. Nevertheless, we consider Carrasco's argument that the trial court should have instructed the jury pursuant to a modified version of CALCRIM No. 375.

10 In his reply brief, Carrasco claims that his counsel did request a limiting instruction in the trial court. Carrasco's counsel made a reference to a "limiting instruction" in the trial court, but that request was in the context of counsel's request that "Mr. Carrasco's name not be mentioned in all of the testimony regarding [the June 22] incident." (See pt. III.A.2.a., *ante*.) At no time did Carrasco's counsel request that the trial court instruct the jury pursuant to the modified version of CALCRIM No. 375 that Carrasco refers to in his appellate brief.

circumstances, the trial court might have a duty to provide a limiting instruction, sua sponte. (*Id*. at p. 64.) However, in this case, the uncharged offense evidence was not a dominant part of the evidence, was not highly prejudicial, and was not minimally relevant.

We reject Carrasco's argument that any request for a limiting instruction would have been futile. The trial court demonstrated a willingness to limit the scope of the evidence related to the June 22 incident, and Carrasco has not demonstrated that the trial court would have denied a request for an appropriate limiting instruction.

Accordingly, we conclude that the trial court did not err in admitting evidence pertaining to appellants' involvement in the June 22 shooting.[11]

3. *Carrasco's counsel did not provide ineffective assistance by failing to adequately argue that a potential defense witness did not have a valid basis for invoking his Fifth Amendment privilege to refuse to testify*

Carrasco claims that his trial counsel provided ineffective assistance by failing to adequately argue that a potential defense witness did not have a valid basis to invoke his Fifth Amendment privilege to refuse to testify. We review independently both whether the trial court properly determined that the witness could validly invoke the privilege against self-incrimination (*People v. Seijas* (2005) 36 Cal.4th 291, 304 (*Seijas*)), and

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11 Citing *People v. Partida* (2005) 37 Cal.4th 428, Carrasco also claims that the erroneous admission of the uncharged offense evidence violated his constitutional right to due process by rendering the trial fundamentally unfair. In light of our conclusion that the trial court did not err in admitting the evidence, we reject Carrasco's due process claim. (See *id*. at p. 436 ["*If the reviewing court finds error*, it must also decide the consequences of that error, including, if the defendant makes the argument, whether the error was so serious as to violate due process," italics added].)

whether Carrasco's counsel provided ineffective assistance in this regard. (See *In re Resendiz* (2001) 25 Cal.4th 230, 248-249, abrogated on another ground by *Padilla v. Kentucky* (2010) 130 S.Ct. 1473.)

a. *Factual and procedural background*

During trial, the trial court noted on the record that an attorney was present in court appearing on behalf of a potential witness named Victor Limon. The court stated that Limon's counsel had informed the court that Limon intended to invoke his Fifth Amendment privilege and refuse to answer any questions surrounding his involvement in this case. The court stated that it would not allow Limon to assert the privilege in the jury's presence.

Carrasco's counsel requested that he be allowed to "put [Limon] on for a very limited purpose." Carrasco's counsel admitted that that there would be no "avoiding the basis . . . for [Limon] taking the Fifth." Specifically, Carrasco's counsel acknowledged that Limon "would be admitting to being in the company of people that are documented [gang members]," which would constitute a violation of the terms of Limon's probation. Carrasco's counsel nevertheless requested that he be allowed to ask Limon a limited number of questions in front of the jury, to which Limon could respond "that he's with counsel and invoking."

The prosecutor stated that it would not be proper to allow Limon to invoke his Fifth Amendment privilege in front of the jury. The prosecutor observed that Carrasco's counsel's proposed examination would intrude into areas that were subject to Limon's

privilege, "probably upon [a] question or two," both because of the terms of Limon's probation as well as a separate "ongoing investigation. . . ."

Limon's counsel interjected:

> "[Limon's] going to be invoking to any and all questions. He does have a pending investigation with respect to an alleged kidnapping. He was on gang supervision. His indication would be blanket other than his name."

The trial court noted that in light of Limon's intended invocation of his privilege against self-incrimination, "[T]he issue then becomes whether or not the questions that you ask would be . . . relevant." The court suggested that the only relevance of Limon's testimony would be whether he knew Carrasco and Nogales. Carrasco's counsel responded by clarifying the purpose for which he intended to offer Limon's testimony, stating:

> "Mr. Limon would be prepared, I think, to tell this jury that he was in the company of Mr. Carrasco on July 7 and July 8; that . . . Mr. Carrasco, as far as [Limon] knew, never left the . . . party; that [Limon] was taken home by Mr. Carrasco, and identify the route that he was taken home, things of that nature."

The trial court stated that although Limon's testimony would be "extremely relevant," it appeared that there were no questions that counsel could ask Limon that would not "possibly lead to evidence upon which a prosecution could be based and/or a violation of his probation."

The court stated that it was denying Carrasco's counsel's request that Limon be allowed to invoke his Fifth Amendment privilege in front of the jury. Carrasco's counsel then requested that Limon be called to the stand, outside the presence of the jury, for the

purpose of invoking his Fifth Amendment privilege. The court called Limon to the stand. After Limon stated his name, Limon's counsel said, "Mr. Limon will invoke his right to remain silent under the Fifth Amendment on my advice to any and all questions." The court asked Limon whether he was going to follow his counsel's advice to invoke his Fifth Amendment privilege, and Limon responded in the affirmative. The court then stated:

> "The record will reflect that Mr. Limon will invoke his Fifth Amendment privilege as to each and every question other than those that have currently been posed to him. He will be excused at this time."

b. *Governing law*

(i) *The Fifth Amendment privilege against self-incrimination*

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." In *Seijas*, the California Supreme Court outlined case law governing this provision:

> "It is a bedrock principle of American (and California) law, embedded in various state and federal constitutional and statutory provisions, that witnesses may not be compelled to incriminate themselves. In an oft-cited case, the high court stated that this privilege 'must be accorded liberal construction in favor of the right it was intended to secure.' (*Hoffman v. United States* (1951) 341 U.S. 479, 486.) A witness may assert the privilege who has 'reasonable cause to apprehend danger from a direct answer.' (*Ibid.*; [citation].) However, 'The witness is not exonerated from answering merely because he declares that in doing so he would incriminate him-his say-so does not of itself establish the hazard of incrimination.' (*Hoffman v. United States, supra,* at p. 486.) The court may require the witness 'to answer if "it clearly appears to the court that he is mistaken."' (*Ibid.*) 'To sustain the privilege, it need only be evident from the implications of the question, in the setting

> in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' (*Id.* at pp. 486-487.) To deny an assertion of the privilege, 'the judge must be '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate." ' (*Malloy v. Hogan* (1964) 378 U.S. 1, 12, quoting *Hoffman v. United States, supra,* at p. 488.)" (*Seijas, supra,* 36 Cal.4th at p. 304.)

The privilege against self incrimination is not available to a witness on the ground that answering a question might lead to a revocation of probation, because a probation revocation proceeding is not a criminal proceeding. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 435, fn. 7 (*Murphy*).) "[A] probationer may only invoke his privilege against self-incrimination if a truthful answer would expose him to a prosecution for a crime different from the one on which he was already convicted." (*U.S. v. Lee* (3d Cir. 2003) 315 F.3d 206, 213, citing *Murphy*.)

A witness may be able to assert a valid Fifth Amendment privilege with respect to a criminal offense at issue in a trial, notwithstanding that the witness is not a defendant in the case in which he is invoking the privilege. (*People v. Cudjo* (1993) 6 Cal.4th 585, 617 (*Cudjo*); *People v. Mincey* (1992) 2 Cal.4th 408, 442.) In *Cudjo*, the Supreme Court concluded that the trial court had properly permitted a proposed witness (Gregory) not to testify on the ground that his proposed testimony could potentially incriminate Gregory in the offense for which the defendant was being tried ─ the murder of a woman named Amelia P. The *Cudjo* court reasoned:

> "Here, it did not 'clearly appear' that Gregory's proposed testimony could not have tended to incriminate him for the murder of Amelia P. Gregory had been taken into custody as a suspect in that

> offense. Indeed, defendant has argued, both at trial and on this appeal, that the evidence is entirely consistent with the hypothesis that Gregory, rather than defendant, killed Amelia P. Answers to the prosecution's questions about Gregory's observations on the day of the murder, and Gregory's conversations with defendant relating to the murder, could have developed evidence tending to establish Gregory's own complicity in the victim's death." (*Cudjo, supra,* 6 Cal.4th at p. 617.)

(ii) *Ineffective assistance of counsel*

In *People v. Lopez* (2008) 42 Cal.4th 960, 966, the Supreme Court outlined a defendant's burden in establishing that his counsel rendered ineffective assistance:

> " 'In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." [Citations.] Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." [Citation.] If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Citation.]' [Citation.]"

c. *Application*

Carrasco contends that his counsel was ineffective in failing to argue in the trial court that the possibility that Limon's proposed testimony might cause Limon to suffer a revocation of his probation did not constitute a valid basis for Limon to invoke his privilege against self-incrimination. In concluding that Limon had a valid Fifth

Amendment privilege to refuse to testify in this case, the trial court relied, at least in part, on the possibility that Limon's proposed testimony might cause him to suffer a revocation of probation. To the extent that this was the reasoning behind the trial court's ruling, the court was mistaken. (*Murphy, supra,* 465 U.S. at p. 435, fn. 7 ["[T]here can be no valid claim of the privilege [against self incrimination] on the ground that the information sought can be used in [probation] revocation proceedings]".)

However, "we review the trial court's rulings and not its reasoning." (*People v. Mason* (1991) 52 Cal.3d 909, 944.) The People argue that we may affirm the trial court's ruling on the alternative ground that Limon's invocation was valid because his proposed testimony might have implicated him in the charged crimes. We agree.

At trial, certain evidence suggested that Limon may have been involved in the Perez murders. Limon was a member of the Paradise Hills gang. Limon's fingerprints were found on the truck that the People claimed was used in the shootings. Limon shared the physical characteristics of one of the suspects, including sometimes wearing a goatee and mustache, like Carrasco. Limon was present at a party with Carrasco and Nogales the night of the murders. Adriana Orosco, who also was at the party, told police that Limon left the party with Carrasco near the time of the shooting.[12]

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12 At trial, the defense suggested that Limon may have been involved in the Perez murders. Nogales's counsel posed the following question to a police detective: "It would be your opinion that [Limon] would be of the mindset to commit such an act, a double murder?" The detective responded in the affirmative. Carrasco's counsel asked a police detective whether Limon's DNA had been compared to the DNA found on the murder weapon. During closing argument, both Carrasco's counsel and Nogales's counsel argued that Limon may have been involved in the murders.

Because there is evidence in the record that is consistent with Limon having been a participant in the Perez murders, Limon's proposed testimony regarding where he was and who he was with, at or near the time of those murders, could have tended to establish Limon's complicity in the murders. As in *Cudjo*, it did not "'clearly appear'" that Limon's proposed testimony could not have tended to incriminate him in the charged murders. (*Cudjo, supra,* 6 Cal.4th at p. 617.)

Accordingly, we conclude that the trial court did not err in determining that Limon had a valid basis for invoking his privilege against self-incrimination. We therefore reject Carrasco's related claim that his trial counsel rendered ineffective assistance by failing to adequately argue that Limon did not have a valid basis to invoke his Fifth Amendment privilege.

Nogales continues this line of argument in his brief on appeal, stating, "Notably, Mr. Limon was the *only* person identified as leaving the party with Mr. Carrasco at the time of the shooting[s]. It is entirely plausible that Mr. Limon participated in the shooting[s] earlier that evening and then gave Mr. Nogales the gun and shirt to hold, hide, or discard . . . " Similarly, Carrasco argues that on the night of the Perez murders "[Carrasco] was in the company . . . of many . . . members [of the Paradise Hills gang] who may well have been the true culprits of the crime."

4. *Carrasco's counsel's failure to move to preclude Detective Hobbs from testifying that Carrasco said that he did not know a person named "Pecas" was not prejudicial*

Carrasco claims that his trial counsel provided ineffective assistance in failing to move to preclude San Diego Detective Steven Hobbs from testifying that Carrasco told Detective Hobbs that Carrasco did not know a person named "Pecas."[13]

a. *Factual and procedural background*

Prior to trial, the People filed a motion to admit statements that Carrasco made to San Diego Police Officer Gregory Minter and Detective Hobbs after the police detained Carrasco at a gas station, approximately three and half hours after the events underlying the charged offenses occurred.[14] In their motion, the People noted that the officers had detained Carrasco, placed Carrasco in handcuffs for some period of time, and conducted several curbside showups during which eyewitnesses were asked whether they could identify Carrasco as one of the perpetrators of the Perez murders. The People stated that approximately an hour after the initial detention and after the completion of the curbside showup process, Detective Hobbs asked Carrasco "how Pecas was doing. . . ." Carrasco responded by asking Detective Hobbs who Pecas was. Hobbs stated, "[Y]ou know, the guy who lives over on Dorianna Street." Carrasco responded that he did not know a "homie named Pecas."

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13 "Pecas" is Nogales's moniker or nickname.

14 Carrasco's claim on appeal relates only to Carrasco's statements to Detective Hobbs. We therefore restrict our recitation of the facts to those statements.

During a pretrial hearing, the trial court stated that its tentative ruling would be to admit Carrasco's statements on the ground that the statements were not the product of a custodial interrogation necessitating an advisement under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), in light of various cases that the People cited in their motion. Carrasco's counsel said that he would submit on the tentative, and stated, "I ask only that I be allowed before opening statements to be able to look at some of those cases. I haven't had an opportunity to look at that issue."

The court responded, "Certainly can. The tentative will be at this point to grant the People's request to use those statements. And we'll leave it up to you, [Carrasco's counsel,] to go ahead and request time to address that before opening statement."

Carrasco's counsel did not request that the court reconsider the issue prior to opening statements. At trial, Detective Hobbs testified concerning his conversation with Carrasco while Carrasco was being detained at the gas station, as follows:

> "[Prosecutor]: What did you ask him about Pecas?
>
> "[Detective Hobbs]: How's Pecas doing? [¶] He goes, 'Who's Pecas?' [¶] I said, 'The kid on Doriana.' [¶] He said he doesn't know a homey named Pecas."
>
> [The Prosecutor]: At all?
>
> [Detective Hobbs]: At all."

Carrasco's counsel did not object to Detective Hobbs's testimony. During the following session of court, outside the presence of the jury, Carrasco's counsel stated that it had been his understanding that there would be some further hearing regarding the admissibility of Detective Hobbs's testimony, prior to the testimony being introduced in

evidence. After the court reviewed the record of the pretrial hearing at which the issue was discussed, the court stated that it was proper for the prosecutor to present the evidence. Carrasco's counsel registered further objections to the admissibility of Hobbs's testimony.

After Carrasco's counsel stated his objections, the trial court indicated that it would consider Carrasco's counsel's comments as a motion to strike Detective Hobbs's testimony. The court then stated "I don't believe, as I said before, having reviewed all the material, that it rises to the dignity of a custodial interrogation that would require [Carrasco] being *Mirandized*," and denied the motion to strike.

b. *Governing law*

(i) *Miranda and custodial interrogation*

"*Miranda* requires courts in criminal cases to exclude, at least from the prosecution's case-in-chief, self-incriminatory statements made by the accused during custodial interrogation unless the accused has knowingly and voluntarily waived the Fifth Amendment privilege against self-incrimination, which in this context includes the rights to silence and the assistance of counsel. [Citations.]" (*People v. Lessie* (2010) 47 Cal.4th 1152, 1156.) "'Thus two requirements must be met before *Miranda* is applicable; the suspect must be in "custody," and the questioning must meet the legal definition of "interrogation."' [Citation.] The prosecution has the burden of proving that a custodial interrogation did not take place. [Citation.] [¶] A person is in custody for purposes of *Miranda* if he is 'deprived of his freedom in any significant way or is led to believe, as a reasonable person, that he is so deprived.' [Citation.] 'Interrogation consists of express

questioning or of words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.' [Citations.]" (*People v. Whitfield* (1996) 46 Cal.App.4th 947, 953.)

(ii) *Ineffective assistance of counsel*

As noted in part III.A.3.b.ii., *ante*, "[A] defendant asserting ineffective assistance of counsel must demonstrate '(1) that counsel's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to defendant, i.e., a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050.)

c. *Carrasco has not established that he was prejudiced by his trial counsel's failure to move to preclude Hobbs's testimony regarding Carrasco's statements*[15]

Assuming, without deciding, that Detective Hobbs subjected Carrasco to a custodial interrogation without providing a *Miranda* warning and without obtaining a waiver of Carrasco's Fifth Amendment privilege against self-incrimination, and further assuming that Carrasco's counsel's failure to move to preclude Detective Hobbs's testimony constituted deficient attorney performance, we conclude that Carrasco has not

15 Carrasco's sole claim on appeal with respect to this issue is that his trial counsel "rendered ineffective assistance of counsel by failing to move to *preclude* Hobbs from testifying about [Carrasco's] statements to him on the basis that [Carrasco] had not been advised of his rights pursuant to *Miranda*." Carrasco does not claim that the trial court erred in denying Carrasco's counsel's motion to strike Hobbs's testimony.

demonstrated that there is a reasonable probability that, but for his counsel's deficient performance, he would have received a more favorable result at trial.

Detective Hobbs's testimony on this issue was a very minor part of the evidence in the People's case against Carrasco. (See *People v. Noguera* (1992) 4 Cal.4th 599, 627 [concluding erroneous admission of evidence not prejudicial in light of "minor-role the contested hearsay statement likely played in the jury's deliberations"].) The People's case against Carrasco was based primarily on gang evidence, eyewitness testimony, testimony related to Carrasco's whereabouts around the time of the murders, physical evidence linking Nogales to the murder weapon, and testimonial and physical evidence linking Carrasco and Nogales to each other. While Carrasco is correct that the prosecutor briefly mentioned Carrasco's denial that he knew Pecas during his closing argument as evidence tending to show Carrasco's consciousness of guilt, the majority of the prosecutor's argument pertained to the other evidence of Carrasco's guilt mentioned above.[16]

The People presented strong evidence of Carrasco's guilt from multiple sources. The People presented undisputed evidence that the driver of the truck used in the murders called out the gang name "Paradise Hills" or "P.H." just before the murders, and that the murders were committed within the territory of the Lomita Village 70's gang, a rival of the Paradise Hills gang. The People also presented overwhelming evidence that Carrasco

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16 More specifically, the prosecutor's closing argument spanned 59 pages of reporter's transcript. The prosecutor's remarks pertaining to the Pecas statement comprise approximately one half of a page. The prosecutor did not refer to Detective Hobbs's testimony during his rebuttal closing argument, which comprised 24 pages of the reporter's transcript.! (RT 1095-2154, 2152, RT 2278-2302)!

was a Paradise Hills gang member, and that, as such, he would have the motive to assist in the commission of the murders. In this regard, in addition to the uncharged offense evidence discussed in part III.A.2., *ante*, at trial, the People played a jail house recording of Carrasco performing a rap in which he made repeated references to the rivalry between Lomita Village 70's and Paradise Hills, and his willingness to commit murders in furtherance of the Paradise Hills gang. For example, in one reference, Carrasco stated, "I'm driving through Lomita, popped a 'P' in the sky, now which one you faggots want to die."[17]

The People also presented strong, albeit not overwhelming, eyewitness testimony establishing that Carrasco was the driver of the truck used in the murders. Eyewitnesses testified that the truck used in the murder was a white pickup truck with an extended cab. The People presented undisputed testimony that Carrasco was driving a white pickup truck with an extended cab on the night of the murders.

In addition, several eyewitnesses provided descriptions of the driver of the white pickup truck to the police shortly after the murders that matched Carrasco's physical appearance on the night of the murders. Detective Damon Sherman, a gang detective who was familiar with the Paradise Hills gang, testified that when he arrived at the scene of the murders, he learned that eyewitnesses had described the driver as a Hispanic male with a mustache and a goatee, and whose hair was longer on the top and shorter on the sides. Detective Sherman testified that Carrasco was the only Paradise Hills gang

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17 A gang detective testified that references to "popping a 'P'" could be interpreted as making a gang sign identifying oneself as being a Paradise Hills gang member.

member in his late teens to early twenties[18] who fit this physical description and who was out of custody at the time of the murders.

Although no eyewitness was able to make a definitive identification of Carrasco at the curbside showup approximately four hours after the murders, Rene Perez told officers at the curbside showup, "Sure looks like him, the face and hair on his face look like the guy I saw in the truck." Several weeks later, Rene Perez told detectives that he was confident that Carrasco was the driver of the truck that was used in the murders.

With respect to Carrasco's whereabouts just before the murders, the People presented undisputed evidence that on the night of the murders, Carrasco had been at a party approximately two and a half miles from the scene of the murders. Further, the People presented evidence that Carrasco left the party with two other persons, in a white pickup truck, near the time of the murders, and that he returned to the party shortly after the murders occurred. In addition, it was undisputed that Carrasco and Nogales were close friends and that they had spent the hours preceding the murders together. In addition, the People presented undisputed evidence that Carrasco gave Nogales a ride home from the party, and that police found Nogales only a few hours later with the murder weapon in his possession.

In light of the minor role that Hobbs's testimony on this issue played during the trial, and the strong evidence of Carrasco's guilt, we conclude that Carrasco has not

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18 Detective Sherman testified that Paradise Hills gang members in the age range of 14 to 22 years are those most likely to commit crimes to demonstrate their loyalty to the gang.

demonstrated that that he was prejudiced by trial counsel's failure to move to preclude Hobbs's testimony concerning Carrasco's statement that he did not know anyone by the name of Pecas.

5. *The cumulative error doctrine does not require reversal of the judgment*

Carrasco claims that to the extent this court concludes that no individual error related to his claims merits reversal, the cumulative error doctrine requires reversal of the judgment.

"Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) In part III.A.1., *ante*, we concluded that the trial court committed harmless error in instructing the jury on second degree felony murder. In part III.A.4., *ante*, we considered Carrasco's counsel's failure to move to preclude Detective Hobbs from testifying with respect to Carrasco's statement that he did not know a person named Pecas. We assumed that counsel's representation fell below an objective standard of reasonableness, but concluded that Carrasco had not established that counsel's assumed deficient performance was prejudicial. Assuming that we may aggregate Carrasco's claim of ineffective assistance of counsel with his claim of instructional error, and after considering the potential prejudice from any cumulative effect of any errors, we conclude that reversal of the judgment is not required under the cumulative error doctrine, in view of the insignificance of the impact of the possible errors in the context of the entire trial.

B. *Nogales's appeal*

1. *There is sufficient evidence in the record to support the jury's verdicts finding Nogales guilty of two counts of second degree murder and one count of shooting at an inhabited residence*

Nogales claims that there is insufficient evidence in the record to support the jury's verdicts finding him guilty of two counts of second degree murder (§ 187, subd. (a)) (counts 3, 4) and one count of shooting at an inhabited residence (§ 246) (count 5).

a. *Governing law and standard of review*

(i) *Sufficiency of the evidence*

"A state court conviction that is not supported by sufficient evidence violates the due process clause of the Fourteenth Amendment and is invalid for that reason." (*People v. Rowland* (1992) 4 Cal.4th 238, 269, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 313-324.) In determining sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence ─ that is, evidence which is reasonable, credible, and of solid value ─ such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

We must presume in support of the judgment the existence of every fact that the trier could reasonably have deduced from the evidence (*People v. Rayford* (1994) 9 Cal.4th 1, 23), and we must draw all reasonable inferences in support of the judgment. (*People v. McCleod* (1997) 55 Cal.App.4th 1205, 1221.) The judgment is not subject to reversal simply because the prosecution relied heavily on circumstantial evidence or because conflicting inferences on matters bearing on guilt could be drawn at trial. Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two different interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of guilt beyond a reasonable doubt. (*People v. Rodriguez*, *supra*, 20 Cal.4th at p. 11.) This court must affirm the convictions as long as a rational trier of fact could have found guilt based on the evidence and inferences reasonably drawn therefrom. (*People v. Millwee* (1998) 18 Cal.4th 96, 132.) "[R]eversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

In assessing the sufficiency of evidence to support a criminal conviction, "we need not determine that the evidence was strong, and indeed it may be viewed as not strong." (*People v. Hughes* (2002) 27 Cal.4th 287, 365.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond, supra,* 71 Cal.2d at p. 755.) "Given this court's limited role

on appeal, defendant bears an enormous burden in claiming there is insufficient evidence to sustain his . . . convictions." (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.)

(ii) *Substantive law*

"Second degree murder is the unlawful killing of a human being with malice aforethought, but without the additional elements that it be willful, deliberate and premeditated, which are required for first degree murder. [Citations.]" (*People v. Superior Court (Costa)* (2010) 183 Cal.App.4th 690, 697.)

"The elements of a violation of section 246 are '(1) acting willfully and maliciously, and (2) shooting at an inhabited house. [Citation.]' [Citation.]" (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1501.)

b. *Application*

Nogales's primary argument in support of his insufficiency claim is that there is a lack of evidence that he was present in the truck that was used in the murders at the time of the murders. While the evidence on this point is far from overwhelming, we conclude that there is sufficient evidence from which the jury could have reasonably inferred that Nogales was present in the truck used to commit the murders at the time of the murders, and that he was, in fact, the shooter.

Most significantly, police found Nogales in possession of the murder weapon just a few hours after the commission of the murders. (See *People v. DePriest* (2007) 42 Cal.4th 1, 45 ["The jury could readily conclude that defendant had the murder weapon because he was the murderer"].) Further, Nogales's DNA was found on the murder weapon. While a second unidentified individual's DNA was also found on the gun,

Nogales was the primary contributor of the DNA found on the gun.[19] Moreover, the police found a single fingerprint on the murder weapon. That sole fingerprint matched Nogales's fingerprint. In addition, as discussed in part III.A.2., *ante*, the People presented evidence that Nogales possessed and fired the murder weapon during a separate shooting approximately two weeks before the murders. (See *People v. Carpenter, supra*, 15 Cal.4th at pp. 361-362 ["The ballistics evidence showed that the same gun was used each time, strongly indicating that the same person committed each crime. Thus, evidence that defendant was the gunman in one incident was evidence that he was the gunman in the other."].)

The circumstances under which police found the murder weapon are also consistent with Nogales's guilt. Police found the murder weapon in a pile of personal belongings, including a white t-shirt, next to a couch in the front room of Nogales's apartment, suggesting that the gun had been placed there at the same time as the personal belongings.[20] Sara Perez, who was present at the scene of the murders, testified that she saw two figures wearing white t-shirts in the truck that was used in the murders. When police confronted Nogales and ordered him out of his apartment at gunpoint, Nogales appeared "stunned" and began to reach toward the area where police later found the gun.

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19 Specifically, a DNA expert testified, "When I look at the swab from the gun, it is primarily DNA from a single individual [Nogales]. There's a small amount of DNA from a second individual, but a very limited amount."

20 The officer who found the gun testified that the pile contained "a key chain with a red ornament, a black hat and white t-shirt. Maybe a sheet."

Nogales claims that it is "entirely plausible" that another person gave Nogales the gun after the shooting.[21] However, the jury could have reasonably rejected this theory in light of evidence that Nogales was, "the predominant DNA contributor to the gun," the only fingerprint found on the murder weapon belonged to Nogales, and Nogales had possessed and fired the murder weapon approximately two weeks before the murders. In any event, it is the jury's role, not the reviewing court's, to determine whether circumstantial evidence is amenable to a reasonable interpretation that suggests innocence. (See *People v. Rodriguez, supra*, 20 Cal.4th at p. 11 ["'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt"].)[22]

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21 In his brief, Nogales "acknowledges there was no evidence anyone gave him the [murder] weapon to hold after the shooting."

22 The trial court instructed the jury in accordance with CALCRIM No. 224 in relevant part as follows: "Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

Nogales's possession of the murder weapon was not the only evidence of his guilt. The People presented overwhelming evidence both that the murder was committed by a member of the Paradise Hills gang (see pt. III.A.4.c., *ante*), and that Nogales was active in the Paradise Hills gang. A gang detective testified that Nogales was one of approximately 20 "riders," who were the most likely gang members to have committed the charged offenses.

In addition, as noted in part III.A.4.c., *ante*, the People presented strong evidence that Carrasco was the driver of the truck used to commit the murders, and considerable evidence linking Carrasco and Nogales. Carrasco testified at trial that he and Nogales were "very close friend[s]." Nogales spent the night preceding the murders with Carrasco at Carrasco's girlfriend's house. Nogales and Carrasco also spent much of the day of the murders together. Nogales was with Carrasco at a party approximately two and a half miles from the scene of the murders on the night of the murders. Further, the People presented evidence that Carrasco left the party in a white pickup truck with two other persons near the time of the murders, and Rene Perez testified that the murders were committed by a passenger riding in a white pickup truck. Carrasco also gave Nogales a ride home from the party, after the murders.

Finally, the record contains physical evidence linking Nogales to the murders. Nogales had a small amount of gunshot residue on his hand. An expert testified that a person may come into contact with gunshot residue by firing a firearm, being near a weapon that is being discharged, or handling a weapon that has been fired. Nogales's fingerprints were found on the bed of the white pickup truck driven by Carrasco, on the

passenger side. The location of the fingerprints on the truck was consistent with Rene Perez's testimony that the shooter emerged from the passenger side of the truck and began shooting. While far from conclusive, this physical evidence tended to corroborate the other evidence that Nogales shot and killed Frank and John Perez.[23]

Accordingly, we conclude that there is sufficient evidence in the record to support the jury's verdicts finding Nogales guilty of two counts of second degree murder (§ 187, subd. (a)) and one count of shooting at a inhabited residence (§ 246).

2. *The abstracts of judgment must be corrected to reflect the imposition of the proper court security fee*

Nogales claims that the trial court erred in imposing a court security fee in the amount of $140, rather than $100. (Former § 1465.8) The People concede that the abstracts of judgment should be modified to reflect the imposition of a $100 court security fee as to Nogales, and a $60 court security fee as to Carrasco. We order the abstract of judgments modified in accordance with the People's concessions.

IV.

DISPOSITION

The judgment is modified to reflect the imposition of a $100 court security fee as to Nogales, and a $60 court security fee as to Carrasco. The trial court is directed to correct the abstracts of judgment in accordance with these modifications, and to forward

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[23] Nogales also argues that there is insufficient evidence in the record to support his convictions on counts 3, 4, and 5 pursuant to an aiding and abetting theory. In light of our conclusion that there is sufficient evidence in the record that Nogales was guilty of the charged offenses as the shooter, we need not consider this contention.

the corrected abstracts of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.